LORRAIN ESME OSMAN & A WRIT OF HABEAS CORPUS, RE *AD SUBJICIENDUM*

QUEEN'S BENCH DIVISION
LORD JUSTICE RUSSELL
JUSTICE HODGSON
[CO/395/91]
22 MAY 1991

ADMINISTRATIVE LAW: *Application for habeas corpus ad subjiciendum - Extradition to Hong Kong - Applicant in custody under Fugitive Offenders Act - Repeal - New Extradition Act - Circumstances under which a person can be kept in custody until returned to requesting State - Specialty provision - Undertaking by Governor of Hong Kong - Certificate by Secretary of State - Whether protects applicant - Whether abuse of process - Whether unjust or oppressive - Length of time - Whether fresh evidence - Res judicata - Not raised in previous habeas corpus applications - Administration of Justice Act 1960 [UK], s. 14(2) - Extradition Act 1989 [UK], ss. 6(4), (7), 11(3)(b), 12(1), (6) - Fugitive Offenders Act 1967 [UK], s. 7(5) - Fugitive Offenders (Hong Kong) Order 1967 - Basic Law of Hong Kong, Article 8.*

On 1 June 1987, the applicant L was committed to custody under s. 7(5) of the Fugitive Offenders Act 1967 (the 1967 Act), to await his return to Hong Kong in respect of 42 alleged offences of dishonesty, alleged to have occurred between December 1979 and October 1983 and said to involve millions of pounds, US and Hong Kong dollars.

The 1967 Act was repealed and replaced by the Extradition Act 1989 (the 1989 Act). Section 6 of the 1989 Act provides that a person shall not be kept in custody for the purpose of return unless effective specialty provision is made. An undertaking by the Governor of Hong Kong dated 26 April 1991 was given in terms of s. 6(4)(a),(b) and (c) of the 1989 Act and on 29 April 1991, the Secretary of State issued a certificate in the wording of the undertaking. On 4 April 1990, the Basic Law was promulgated by the People's Republic of China (the Republic) whereby Article 8 states that laws previously in force in Hong Kong shall be maintained except for any that contravene the Basic Law. The Republic does not have extradition arrangements with any other country and the basic law contains no such provision.

In his application for a writ of *habeas corpus*, L's Counsel submits that the Governor's undertaking does not and cannot afford to L the protection contemplated by s. 6(4) of the 1989 Act and that under s. 11(3)(b), taking into account the passage of time since L is alleged to have committed the offences, it would be unjust or oppressive to return him.

L also seeks leave to apply for judicial review in the form of a declaration that the Home Secretary must afford L a reasonable time to consider any order made by the Secretary of State under s. 12(1) of the 1989 Act ordering L's return to Hong Kong. L also wanted to adduce fresh evidence in the form of a single letter dated 5 February 1991 from Bank Bumiputra Malaysia Bhd. (BBMB) as to missing documents.

The respondents submitted that advancing the s. 6(4) point is an abuse of process and that s. 11(3)(b) is defeated by s. 14(2) of the Administration of Justice Act 1960 (the 1960 Act).

Held:

[1] The letter from BBMB could not have been produced by L at the 4th *habeas corpus* application ([1991] 4 CLJ (Rep) 1242). Therefore, L is not barred from adducing it under s. 14(2) of the 1960 Act.

[2] The s. 6(4) point would, if valid, have secured L's release whenever it was taken and there was no need for L to wait until the last possible moment after the Secretary's warrant had been issued under s. 12 of the 1989 Act. However, where an applicant follows an arguable though erroneous legal path as recommended by his advisers, his late raising of an argument previously open to him would not necessarily amount to an abuse of process of the type contemplated by Gibson J in *Tarling's* case. In the special circumstances of this case, there was no abuse of process.

[3] (a) The 1989 Act contains reciprocal provisions binding upon the United Kingdom (UK) government in the event of a person being returned to the UK;

(b) s. 6(4) cannot and does not contemplate anything more than a specialty provision such as was offered in this case by the Hong Kong government in respect of the colony of Hong Kong;

(c) giving the words "be dealt with there" in subsection (4) their natural meaning must mean "be dealt with in the colony and by the colony";

(d) in order to give effect to s. 6(4) it is not necessary to look beyond the requesting State - to do so would not only be unnecessary but would be to embark upon an exercise which would be wholly inappropriate when the Court is construing the 1989 Act and

(e) in giving the said undertaking, which amounted to an "arrangement made", the Government of Hong Kong complied with the requirements of s. 6(4).

[4] The Court in the 4th *habeas corpus* application had rejected the argument that the loss of the "missing documents" would make L's return to Hong Kong unjust or oppressive for a number of different reasons. (see [1991] 4 CLJ (Rep) 1242). Even had that Court concluded that the documents would definitely remain untraced, it would not have made the slightest difference to the Court's decision. Therefore, the Secretary of State may proceed to issue his warrant under s. 12 and the application for *habeas corpus* is refused.

[5] As a result of the letter of undertaking by L's solicitors not to pursue the application for judicial review if the writ of *habeas corpus* was refused, the application for leave to apply for judicial review was refused. Notwithstanding this letter of undertaking, having regard to the history of this case, and exercising its discretion, the Court would have refused the application. If the Secretary of State issues his warrant, the Court cannot conceive circumstances where the decision of the Secretary of State would be successfully attacked by way of judicial review, and there is no reason to suppose that giving L time to consider the Secretary of State's decision could do other than delay the inevitable.

[L's application for writ of habeas corpus dismissed with costs.]

Cases referred to:
In re Hastings (No. 2) [1959] 1 QB 358 ***(foll)***
Kakis v. The Government of the Republic of Cyprus [1978] 1 WLR 779 ***(foll)***
R v. Governor of Pentonville Prison, ex p. Osman [1990] 1 WLR 277 ***(cit)***
R v. Governor of Pentonville Prison, ex p. Tarling [1979] 1 WLR 1417 ***(cons)***
Yat Tung Investment Co. Ltd. v. Dao Heng Bank Ltd. [1975] AC 581 ***(cons)***

Legislation referred to:
Administration of Justice Act 1960 [UK], s. 14(2)
Extradition Act 1989 [UK], ss. 6(4), (7), 11(3)(b), 12(1), (6)
Fugitive Offenders Act 1967 [UK], s. 7(5)

For the applicant - A. Scrivener QC, (J Mok with him); M/s. Eversheds
For the Government of Hong Kong - Clive Nicholls QC, (G. Grant with him); M/s. Clifford Chance
For the Governor of Brixton Prison - C. Montgomery; Crown Prosecution Service

JUDGMENT

Lord Justice Russell:

This is the judgment of the Court which has before it two applications in the name of Lorrain Esme Osman.

In the first the applicant seeks a writ of *habeas corpus ad subjiciendum*. The respondents are the Government of United Kingdom Dependency of Hong Kong and the Governor of Brixton Prison wherein the applicant is currently detained. In the second application the applicant seeks leave to apply for judicial review in the form of a declaration that the Home Secretary must afford the applicant a reasonable time to consider any order made by the Secretary of State under s. 12(1) of the Extradition Act 1989 ordering the applicant's return to Hong Kong. It is common ground that the second application arises for consideration only if the first application fails.

As long ago as 1 June 1987, after a hearing which occupied some 66 working days, the Chief Metropolitan Stipendiary Magistrate made an order under s. 7(5) of the Fugitive Offenders Act 1967 committing the applicant to custody to await his return to Hong Kong in respect of 42 alleged offences of dishonesty. They were alleged to have occurred between December 1979 and October 1983 and they involved allegations of conspiracy to defraud, conspiracy to steal, false accounting, bribery and theft. In monetary terms the charges involved many millions of pounds sterling, United States and Hong Kong dollars. It is unnecessary in this judgment to say any more about the alleged offences. In summary form the circumstances of them were outlined in the judgment delivered by Lloyd LJ when in 1988 the Divisional Court dealt with and dismissed an earlier application for *habeas corpus* that has been made by this applicant, (*R v. Governor of Pentonville Prison ex parte Osman* [1990] 1 WLR 277 at pp. 283 to 288). This application was not the only application for *habeas corpus*, apart from the instant one, that has been made since the order of the Metropolitan Magistrate. There have in fact been three other applications for *habeas corpus*, all of which have been dismissed by the Divisional Court, so that the current application is the fifth such application.

Since 1 June 1987 a number of developments have taken place which have a bearing upon the current application. The Fugitive Offenders Act 1967 has been repealed and we are now concerned with the Extradition Act 1989. This application is primarily concerned with ss. 6 and 11 of the Act. We set out first the relevant provisions of s. 6:

> (4) A person shall not be returned, or committed or kept in custody for the purposes of such return, unless provision is made by the relevant law or by an arrangement made with the relevant foreign state, Commonwealth country or colony, for securing that he will not, unless he has first had an opportunity to leave it, be dealt with there for or in respect of any offence committed before his return to it other than:
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> (a) the offence in respect of which his return is ordered;
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> (b) an offence other than an offence excluded by subsection (5) below, which is disclosed by the facts in respect of which his return was ordered; or
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> (c) subject to subsection (6) below any other offence being an extradition crime in respect of which the Secretary of State may consent to his being dealt with.
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> (5) The offences excluded from para. (b) of subsection (4) above are offences in relation to which an order for the return of the person concerned could not lawfully be made.

(6) The Secretary of State may not give consent under para. (c) of that subsection in respect of an offence in relation to which it appears to him that an order for the return of the person concerned could not lawfully be made, or would not in fact be made.

(7) Any such arrangement as is mentioned in subsection (4) above which is made in a designated Commonwealth country or a colony may be an arrangement made for the particular case or an arrangement of a more general nature; and for the purposes of that subsection a certificate issued by or under the authority of the Secretary of State confirming the existence of an arrangement with a Commonwealth country or a colony and stating its terms shall be conclusive evidence of matters contained in the certificate.

With the repeal of the 1967 Act the view was taken that the Governor of Hong Kong should give an undertaking to the Secretary of State so as to afford the applicant the protection required by the provisions of s. 6(4). Protection had earlier been afforded by the Fugitive Offenders (Hong Kong) Order 1967. The undertaking given by the Governor was dated 26 April 1991 and reads as follows:

To: Her Majesty's Principal Secretary of State for the Home Department

Sir,

I, David Wilson, Knight Grand Cross of the Most Distinguished Order of Saint Michael and Saint George, Governor of Hong Kong, undertake to Her Majesty's Principal Secretary of State for the Home Department that, if he is returned to Hong Kong, Lorrain Esme Osman will not, unless he has first had an opportunity of leaving Hong Kong, be dealt with in Hong Kong for or in respect of any offences committed before his return other than:

(a) the offences in respect of which his return is ordered;

(b) an offence other than an offence in relation to which an order for his return could not lawfully be made, which is disclosed by the facts in respect of which his return is ordered; or

(c) any other offence being an extradition crime, other than an offence in relation to which, it appears to Her Majesty's Principal Secretary of State for the Home Department an order for his return could not lawfully be made or would not in fact be made, in respect of which Her Majesty's Principal Secretary of State may consent to his being dealt with.

In witness hereof is set the Public Seal of Hong Kong and my signature.

This 26 April 1991.

It will be observed that sub - paras. (a), (b) and (c) of the undertaking mirror that which is set out in sub - paras. (a), (b) and (c) of s. 6(4) of the Act. On 29 April 1991 the Secretary of State issued the following certificate:

In pursuance of the powers conferred by s. 6(7) of the Extradition Act 1989 I hereby certify under the authority of the Secretary of State that an arrangement has been made in pursuance of s. 6(4) of that Act with the Government of Hong Kong in the case of Lorrain Esme Osman in the following terms.

There then followed in the certificate precisely the wording of the undertaking.

There were also developments in the Far East. In December 1984 the Chinese and British governments had signed a joint declaration on the future of Hong Kong affirming that with effect from 1 July 1997 the Government of the People's Republic of China will resume the exercise of Sovereignty over Hong Kong. Thereafter, no doubt after much diplomatic activity, it was agreed between the respective governments that Hong Kong should become in 1997 a special administrative region of the People's Republic of China and on 4 April 1990 the President of the People's Republic promulgated the basic law of the region. Article 8 reads:

> The laws previously in force in Hong Kong, that is, the common law, rules of equity, Ordinances, subordinate legislation and customary law shall be maintained except for any that contravene this law, and subject to any amendment by the legislature of the Hong Kong Special Administrative Region.

The submissions made succinctly by Mr. Scrivener QC on behalf of the applicant in support of the writ for *habeas corpus* can be shortly stated. Counsel submits that the Governor's undertaking does not and cannot afford to the applicant the protection contemplated by s. 6(4). The position is a unique one; the applicant, if returned to Hong Kong, will inevitably be sentenced to a term of imprisonment which he will still be serving on 1 July 1997. So much is acknowledged. No one knows what will then be his fate and certainly the Governor of Hong Kong is not in a position to say that the People's Republic of China will be prepared to give the applicant the opportunity to leave Hong Kong should the decision be taken to detain him for any of the purposes referred to in s. 6(4). The People's Republic of China has no extradition arrangements with any other country. The basic law contains no such provision, and it is matter of speculation whether the Special Administrative Region will be able to legislate or will be prepared to legislate so as to conclude extradition arrangements recognizing the speciality principle. Since s. 6(4) provides that the person shall not be returned or kept in custody for the purpose of return unless effective specialty provision is made, it follows that the writ should issue.

The arguments advanced on behalf of the Hong Kong Government and the Governor of the prison were, first, that the application for the writ of *habeas corpus* is an abuse of process and, secondly, that in any event upon a proper construction of s. 6(4) the applicant is not entitled to any relief.

Before considering the contentions of Mr. Clive Nicholls QC that the application for *habeas corpus* is an abuse of process and also barred by s. 14(2) of the Administration of Justice Act 1960, it is necessary to record what we have been told has been the thinking behind the course adopted by the applicant and his legal advisers. In 1987 the applicant applied in the Hong Kong Courts for leave to apply for judicial review of the decision of the Governor of Hong Kong requesting the return of the applicant to Hong Kong. Mayo J refused leave. The applicant appealed to the Court of Appeal. His appeal failed. The Court refused leave on discretionary grounds but, in dealing with the substantive grounds which were based upon what would happen in July 1997, the Court refused to speculate as to what the position would then be. It is unnecessary to go further into the reasons given by the Court of Appeal. We are, however, told that the applicant's legal advisers, in view of the way the Court of Appeal had dealt with the application for leave, concluded that the proper time to take the s. 6(4) point now advanced in these proceedings was at the last possible moment. This would be in judicial review proceedings against the Secretary of State's decision, if he made it, under s. 12(1) of the Extradition Act 1989, by warrant, to order the applicant's return to Hong Kong. Accordingly, the argument was not advanced before this Court in the fourth *habeas corpus* application.

The judgment of this Court dismissing the fourth *habeas corpus* application was given on 12 December 1990. Leave to appeal to the House of Lords was sought.

Where, under s. 12, the Secretary of State, by warrant, orders the return of a person to a colony s. 12(6) provides that: "Notice ... shall forthwith be given to the person to be returned". Unlike the position where it is to a foreign state to which the person is to be returned there is no requirement that notice should be given that the Secretary of State is contemplating making such an order and no provision of a period of 15 days after notice for the making of representations.

Accordingly, on 12 January 1991, before the decision of the House of Lords, the applicant's legal advisers wrote to the Secretary of State asking, in effect, that he be treated as if he were to be returned to a foreign state. On 24 January the Secretary of State refused to do this. The letter concluded:

> Any further representation you might wish to make on Mr. Osman's behalf should, therefore, be submitted immediately after the termination of the judicial proceedings or sooner.

The petition to the House of Lords was refused on 2 February 1991.

There has been a good deal of correspondence between the Secretary of State and the applicant's legal advisers aimed at securing that, if the Home Secretary ordered a warrant under s. 12, the applicant would be given sufficient time to seek to challenge the order in judicial review proceedings. It is because no such assurance was forthcoming that the applicant's legal advisers felt obliged to institute *habeas corpus* proceedings rather than wait to challenge the Secretary of State's s. 12 decision (if made) in O. 53 proceedings. As recounted already, they also seek leave to move for judicial review of the Secretary of State's refusal to allow seven days from his order in which to seek to challenge it.

The application for a writ of *habeas corpus* is made on two grounds. The first and most substantial ground is that based on the provisions of s. 6(4) earlier referred to in this judgment; there is a second ground based on the provisions of s. 11(3)(b). The respondents seek to defeat both these contentions *in limine*. They contend that to advance the s. 6(4) point in these proceedings is an abuse of process and that the s. 11(3)(b) point is defeated by the provisions of s. 14(2) of the Administration of Justice Act 1960. We will deal first with the latter.

Section 11(3)(b) provides, so far as material:

> (3) the Court shall order the applicant's discharge if it appears to the Court in relation to the offence, or each of the offences, in respect of which the applicant's return is sought, that:
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> (b) by reason of the passage of time since he is alleged to have committed it. It would, having regard to all the circumstances, be unjust or oppressive to return him.

In his fourth application the applicant advanced as a ground for the granting of the writ the fact that a number of documents, which he would wish to consider and use in his trial, were missing. The facts relating to these documents are set out in detail at pp. 17 to 19 of the judgment of Mann LJ in the earlier application, unreported CO/232/90 dated 12 December 1990. It is not necessary in this judgment to repeat them, save to record that at the conclusion of the hearing, the position was that the bank whose documents were missing had written on 19 October 1990 that it was "trying its utmost" to trace the "missing and misplaced documents". It is also right to record that the Court having looked at the description of the documents in a list, considered that "many of them may be relevant to Osman's defence".

Mann LJ dealt with the documents at p. 13B to 31C as follows:

> That documents had become 'missing' since December 1986 was discovered on 15 October 1990 when inspection pursuant to the order of 20 September 1990 was made. There is no discernible reason why the order could not have been sought earlier than it was. Had it been, the documents may not have become 'missing'. However, that may be (and we shall revert to it) the circumstance or event of documents having become 'missing' does not persuade us that it would be unjust to return Osman. Although the description of the documents given by Mr. Allison suggests that many of them may be relevant to Osman's defence, it is a matter of speculation whether they are so. The position is different from that in *Kakis v. The*

Government of the Republic of Cyprus [1978] 1 WLR 779 where Lord Diplock was able to say at p. 784(a):

> 'It would detract significantly from the fairness of his trial if he were deprived of the ability to adduce the evidence of the only independent witness who would speak to it.'

We can make no such statement as to the documents because whether the absence of the documents would be a significant detraction is necessarily unknown. However that may be, and we recognize that the point is a harsh one, we are not prepared to assume that Bank Bumiputra Malaysia Berhad 'BBMB' will not trace the documents. BBMB is subject to the tardily obtained (as we think) order of 20 September of this year and we do not assume that the process in the Malaysian Court will be ineffectual. What may be traceable and ultimately available at trial is today only a matter for speculation. This Court must not act upon a speculation and, accordingly, we do not accept the argument upon the missing documents. If they remain untraced then their absence will be for consideration by the Court of trial. We will return to the documents in another context.

That is the end of the citation from Mann LJ's judgment.

The applicant seeks to reopen this matter in the light of fresh evidence: it consists of a single letter from the bank dated 5 February 1991 which read:

> Re: Inspection of Documents.
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> We refer to the above and your letter dated 24 January 1991.
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> We have made extensive searches for the missing documents but regret to inform you that to date we have not been able to locate them. We do not think that the documents can ever be found as we have looked extensively for such documents and we now have to consider the documents as lost/missing/destroyed.
>
> As such we are not able to provide you with the documents requested.
>
> Thank you.

The respondents contend that the applicant is barred from seeking relief on the ground of this evidence by the provisions of s. 14(2) of the 1960 Act which provides:

> Notwithstanding anything in any enactment or rule of law where a criminal or civil application for *habeas corpus* has been made by or in respect of any person, no such application shall again be made by or in respect of that person on the same grounds, whether to the same Court or Judge or to any other Court or Judge unless fresh evidence is adduced in support of the application.

In *R v. Governor of Pentonville Prison, ex parte Tarling* [1979] 1 WLR 1417, a decision to which we shall have to return when we consider the abuse of process point, Gibson J (as he then was) giving the judgment of the Court said this about the requirement of fresh evidence:

> the words 'fresh evidence' are used in that meaning which is well known and established in such contexts, namely, not merely evidence additional to or different from the evidence before the Court on the first occasion, but evidence which the applicant could not have put forward on the first application, or which he could not then reasonably be expected to have put forward.

Mr. Nicholls has argued that the letter now produced was not "fresh evidence" but it was undoubtedly additional to the evidence of the previous letter from the bank, which was before the Court in the fourth *habeas corpus* proceedings, and the applicant could not have put it forward on the first application. We conclude therefore that the applicant is not barred from adducing it by the provisions of s. 14(2).

We turn now to s. 6(4). We do not understand Mr. Nicholls to rely upon s. 14(2) in respect of the s. 6(4) point which is the substantial matter advanced before us. Indeed, it is difficult to see how it could be argued that this ground was the same as had previously been advanced as it depends in the end upon an argument that the undertaking to the Governor General does not satisfy the requirements of s. 6(4) and that undertaking was not given until 26 April 1991.

What is argued to be an abuse of process is the fact that the s. 6(4) point was not taken during the fourth *habeas corpus* application. By then the basic law had been promulgated (on 4 April 1990) so that its arguable effect on the provisions of the 1989 Act and, in particular, s. 6(4) were known and therefore should, it is contended, have been advanced.

The respondents rely upon the decision in *Tarling*, already cited. In giving the judgment of the Court Gibson J at p. 1422G said this:

> Before dealing with the questions of jurisdiction it is to be noted that, upon two important principles, which bear upon the position of an applicant for *habeas corpus* who seeks to make a second application in respect of the same detention, there was no substantial dispute between the parties in this case.
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> First, it is clear to the Court that an applicant for *habeas corpus* is required to put forward on his initial application the whole of the case which is then fairly available to him. He is not free to advance an application on one ground, and to keep back a separate ground of application as a basis for the second or renewed application to the Court.
>
> A true doctrine of estoppel known as *res judicata* does not apply to the decision of this Court on an application for *habeas corpus*; we refer to the words of Lord Parker CJ delivering the judgment of the Court *In re Hastings (No. 2)* [1959] 1 QB 358, 371. There is, however, a wider sense in which the doctrine of *res judicata* may be applicable, whereby it becomes an abuse of process to raise in subsequent proceedings matters which could, and therefore should, have been litigated in earlier proceedings: see the judgment of the Privy Council, Lord Morris, Lord Cross and Lord Kilbrandon, in *Yat Tung Investment Co. Ltd. v. Dao Heng Bank Ltd.* [1975] AC 581. In our judgment, that principle is applicable to proceedings for *habeas corpus*, whether under the Act of 1967 or under the general jurisdiction of the Court, although, no doubt, the stringency of the application of the principle may be different in cases concerning the liberty of the subject from that in cases concerning such matters as dispute upon property.

Of the two authorities *In Re Hastings* does not seem to us to be very relevant. The *Yat Tung* case was not a case in which the liberty of the subject was in issue.

The important passage in the *dictum*, so it seems to us, is the way it goes on after the statement of principle:

> that principle is applicable to proceedings for *habeas corpus* ... although, no doubt, the stringency of the application of the principle may be different in cases concerning the liberty of the subject from that in cases concerning such matters as disputes upon property.

It is clear from that passage that the Court in *Tarling* contemplated cases where, although matters "could and therefore should, have been litigated in earlier proceedings" the raising of those matters in later proceedings would not be an abuse of process. It is to be noted that even where the liberty of the subject was not in issue the Privy Council in *Yat Tung* contemplated circumstances in which the full rigour of the principle would not be applied.

In this case Mr. Scrivener's argument is that, because of the stance taken by the Hong Kong Government in the 1988 case, it was proper to seek to delay taking the s. 6(4) point until the last possible moment after the Secretary of State's warrant under s. 12 of the 1989 Act. We

do not accept that argument. Section 6(4) provides that, unless the necessary provisions are in place "a person shall not be ... kept in custody for the purpose of ... return". It follows that the s. 6(4) point would, if valid, have secured the applicant's release whenever it was taken. However, we are not satisfied that where an applicant follows an arguable though erroneous legal path as recommended by his advisers, his late raising of an argument previously open to him should necessarily amount to an abuse of process of the type contemplated by Gibson J.

In the special circumstances of this case therefore we do not hold that there was any abuse of process.

Mr. Nicholls and Miss Montgomery then made submissions upon the proper construction of s. 6(4). Fundamental to those submissions is the proposition that the section deals with two existing juridical countries. In this case Hong Kong, through its government, is the requesting country for extradition, and the United Kingdom, through its government, is the requested country. The section is not concerned with any other governments nor with territories in a geographical sense. The Act contains reciprocal provisions binding upon the United Kingdom government in the event of a person being returned to the United Kingdom (see ss. 18 and 19). Thus, it is submitted, the statute is very much geared to situations which prevail not in the future but at the time when the reciprocal provisions bear upon the requests as between the existing governments for extradition. Section 6(4) requires of a requesting State that there should be a specialty protection in that State. No State can give an undertaking beyond its own sovereign powers nor can the United Kingdom require a State to give an undertaking to bind a different State. The section cannot and does not contemplate anything more than a specialty protection such as was offered in this case by the Hong Kong government in respect of the Colony of Hong Kong. Giving the words their natural meaning "be dealt with there" in subsection (4) must mean "be dealt with in the colony and by the colony".

In our judgment the construction submitted on behalf of the Hong Kong Government and the Governor of the Prison is right. In order to give effect to s. 6(4) it is not necessary, in our view, to look beyond the requesting State, and indeed we take the view that to do so would not only be unnecessary but would be to embark upon an exercise which would be wholly inappropriate when the Court is construing the 1989 Act.

We are satisfied that in giving the undertaking (which amounted to an "arrangement made") the Government of Hong Kong complied with the requirements of s. 6(4).

Upon the application for *habeas corpus* it remains necessary to deal only with additional evidence as to the documents which we have held the applicant is entitled to advance.

We have already cited the passage from the judgment of Mann LJ in the fourth *habeas corpus* application. It is clear from that passage that the Court rejected the argument that the loss of the documents would make Osman's return unjust or oppressive for a number of different reasons. They were:

1. The order for inspection should have been obtained and acted upon earlier than it was. Had it been the documents might not have become missing.

2. It is a matter of speculation whether the documents would be relevant to the applicant's defence.

3. It was not possible to say that the absence of the documents would significantly detract from the fairness of the trial.

4. If the documents remain untraced then their absence would be for consideration by the Court of trial.

In addition Mann LJ said at p. 34E of his judgment:

> All that is 'new' is the discovery that documents are 'missing'. That there is novelty is due to the inexplicable delay in seeking the Malayan order. Had it been sought earlier (for example, in September 1988) either the documents would not have been missing or the point would have been available to be taken in HC3. We do not think that failure to take an obvious step in due time can enable an applicant to claim that there is a novelty which was not fairly available to him on the occasion of an earlier application.

It is true of course that the Court was not prepared to conclude that the documents would necessarily remain untraced and that, had the Court had the fresh evidence, they might have so concluded. But we think it is clear that even had the Court concluded that they would definitely remain untraced it would have made not the slightest difference to the Court's decision.

It follows that the Secretary of State may proceed to issue his warrant under s. 12. The application for the writ of *habeas corpus* is refused.

On 6 March 1991, solicitors for the applicant wrote to the Treasury Solicitor in the following terms:

> Re: L.E. Osman Esq.
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> We refer to the discussions yesterday between Mr. Anthony Scrivener QC and Miss Claire Montgomery with regard to the appropriate procedure to be adopted on the forthcoming applications for leave to apply for judicial review and *habeas corpus*.
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> It was canvassed by Counsel that in order to save the time of the Court, our client's application for leave to apply for judicial review, at present fixed for hearing on 11 March, be heard instead at the conclusion of our client's application for *habeas corpus* tentatively fixed for hearing on 15 March.
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> If the Court were to agree to such a procedure, our client will undertake through us that in the event of his application for a writ of *habeas corpus* being refused he will not seek to pursue his application for leave to apply for judicial review.

It follows from this undertaking that we should refuse the application for leave. Even without the undertaking, however, we would have had regard to the history of this case and, in the exercise of our discretion, we would have refused the application. If the Secretary of State issues his warrant we cannot conceive of any circumstances where his decision could be successfully attacked by way of judicial review, and there is no reason to suppose that giving this applicant time to consider the Secretary of State's decision could do other than delay the inevitable.

Also found at [1991] 3 CLJ 1693

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